

**Criminal Appeal No. 521-DB of 1998 &
Criminal Appeal No. 549-DBA of 2005**

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IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

Date of decision : August 7, 2006

Criminal Appeal No. 521-DB of 1998

Kale alias Kuldeep & others vs State of Haryana

Criminal Appeal No. 549-DBA of 2005

State of Haryana vs Umed Singh and others

**Coram: Hon'ble Mr. Justice Virender Singh
Hon'ble Mr. Justice A.N.Jindal**

Present: Mr. RS Cheema, Senior Advocate, with
Mr. JS Mehandiratta, Advocate, for the appellants.

Mr. Sunil Katyal, DAG, Haryana.

Virender Singh J.,

Vide this judgment we shall be disposing of Criminal Appeal No. 521-DB/1998 filed by Kale @ Kuldeep & five others and Criminal Appeal No. 549-DBA of 2005 filed by the State of Haryana against Umed Singh and two others as both are arising out of one and the same impugned judgment passed by learned Additional Sessions Judge, Gurgaon dated 30-10-1998.

Kale alias Kuldeep (to be referred to as Kale) and Parkash alias Braham Parkash (to be referred to as Parkash) appellants in Appeal No. 521 have been convicted under Sections 302 read with Section 34 IPC, 325 read with Section 34 IPC and 323 read with Section 34 IPC. They are sentenced as under:

Under Section 302 Imprisonment for life and to pay a fine of Rs.
read with Section 34 1,000/-, in default thereof to further undergo RI for
IPC six months.

Section 325 read with RI for three years each and to pay a fine of Rs.
Section 34 IPC 300/- each, in default thereof to undergo further RI
for two months.

Section 323 read with RI for six months.
Section 34 IPC

Umed Singh, Raghunath, Naresh and Smt. Mukat Lado (to be referred to as Lado) have been convicted under Sections 323 read with Section 34 IPC. Naresh has been released on probation whereas the remaining three accused/appellants have been sentenced as under:

Section 323 IPC read RI for six months each.
with Section 34 IPC

All the substantives sentences have been ordered to run concurrently.

As depicted in the charge sheet, Kale alias Kuldeep was aged 18 years, Naresh 25 years, Braham Parkash 22 years, Umed Singh 19

years, Raghunath 70 years and Smt. Mukat Lado was 65 years old at the time of occurrence.

Mr. Cheema learned Senior Advocate states that Naresh appellant has since expired, which fact is not disputed by the learned State counsel.

The State of Haryana also filed an appeal (No. 549-DBA of 2005) against Umed Singh, Raghunath and Smt. Mukat Lado on the plea that their case is also on par with the aforesaid Kale and Braham Parkash, who have already been convicted under Section 302 read with Section 34 IPC, therefore aforesaid three respondents be also convicted under Section 302 read with Section 149 IPC, for which all the accused were initially charged with by the learned trial Court.

Record reveals that no formal order for grant of leave to appeal on the miscellaneous application (Criminal Misc. No. 245-MA of 1999) filed by the State against acquittal of aforesaid three respondents was passed and it was simply ordered to be heard with the main appeal i.e. Crl. Appeal No. 521. Subsequently, vide formal order dated July 12, 2005, the State appeal stands admitted.

Record further reveals that Criminal Revision No. 1327 of 1998 filed by the complainant was dismissed by this Court vide order dated January 22, 1999.

FACTS IN BRIEF:

Mahabir is the deceased in this case. He is son of Mehar alias Mehar Singh (PW-8), the complainant/FIR lodger. The occurrence is dated 17-5-1990 at 5-00PM in village Garoli Khurd, police station Sadar Gurgaon. The distance between the police station and the place of occurrence is 5 kilometers. On the same day at 11-55PM statement Ex. DF of aforesaid Mehar Singh was recorded by HC Bhim Singh in General Hospital, Gurgaon where-in he alleges that some of the land of his plot was grabbed by Raghunath Singh son of Ram Sarup etc., for which a civil suit in Civil Courts at Gurgaon was pending and the next date fixed in the said case was 7-6-1990. His son Mahabir was employed in the office of Deputy Commissioner. On 17-5-1990 at about 5-00PM he and his son Mahabir came out of their house on the street after taking tea. Kale alias Kuldeep (appellant) having a pipe in his hand and Parkash (appellant) armed with a lathi came there and started hurling abuses at them, proclaiming that they would teach them a lesson for filing a civil suit in the courts. Thereafter Kale gave a pipe blow lathi-wise on the head of Mahabir and Parkash gave a lathi blow on his (Ram Mehar's) head followed by another lathi blow on the little finger of the complainant's left hand and third lathi blow on the left side of his hips. At that moment his son-Balbir and brother Khema reached the spot. Umed son of Raghunath and Naresh son of Bhoop

Singh also reached from the other side. On reaching there, Umed gave a brick blow on the chin of Khema, Kale gave a pipe blow on the left thigh and Parkash gave a lathi blow on the back of palm of left hand of Khema and Umed gave one brick blow on the chest of Khema. Naresh gave a lathi blow on the right foot of Balbir. Kale gave a pipe blow on the right side of head of Balbir. Smt. Bhagwani wife of the complainant also reached there. She was given a brick blow on the back of right hand and left cheek by Naresh. When the complainant side raised an alarm, Mohan Lal son of Neki, Mohinder Singh son of Kamal Singh reached there. They rescued them from the clutches of the accused persons else they would have been given more beatings. It is then stated that they had also given injuries to the accused side in their self defence. All the accused then returned to their homes along with their respective weapons.

The police proceedings indicate that initially no cognizable offence was made out. Ultimately on receipt of X-ray report, formal FIR (Ex.DF/3) was recorded in police station Sadar Gurgaon on 19-5-1990 at 2-00PM under Sections 308/323/34 IPC . It reached the Illaqa Magistrate (Chief Judicial Magistrate, Gurgaon) on 21.5.1990 at 8-00 AM. Mahabir was referred to Safdarjang Hospital, Delhi, for treatment where he died on 23.5.20090 at 6-55 AM. After his death, section 304 IPC was added.

During the course of investigation, iron pipe and lathi were recovered from Kale alias Kuldeep and Braham Parkash appellants, but the

same have not been exhibited during trial.

It is worth mentioning here that on the day of occurrence itself i.e. 17-5-1990, at the instance of Raghunath appellant, a DDR No. 23 (Ex. DX) was recorded at 7-50 PM wherein he has stated that at about 5-00 PM when he was present in his house, Mahavir Singh (since deceased) came in front of his house and started abusing him. Raghunath tried to stop him but the latter got enraged and started giving filthy abuses. On hearing it he came out of the house. Mahavir inflicted Jaili blow upon him, which hit him on the right hand thumb. Balbir brother of Mahavir and Mehar Singh son of Bharat came there. Balbir gave lathi blow on the neck of Raghunath. When his wife Laddo Devi came to his rescue, Khem Chand son of Bharta came there armed with a Jaili and gave its blow on her head. Balbir pushed her. Mehar Singh gave one injury on her right wrist and Khem Chand gave Jaili blow on her right foot. On hearing their noise, Hukam Chand son of Ram Sarup, Naresh son of Bhoop Singh came there, who rescued them from their clutches, otherwise they would have been given more beatings. He then states that they had also caused injuries to the other side in their self defence.

The instant case was partly investigated by HC Bhim Singh (PW10) and subsequently investigation was taken over by SI Gurcharan Singh (PW-11). After completion of investigation the accused were challaned to face trial. They were charged under Sections 148 IPC, 302

read with Section 149 IPC, 325 read with Section 149 IPC and 323 read with Section 149 IPC.

Medical evidence of the prosecution side is as under:

Dr. GS Shekhawat (PW5) had medico legally examined Mahabir Singh, Balbir Singh, Khimman, Mehar Singh and Smt. Bhagwani on 17.5.1990. The injuries found on their persons were as under:-

Mahavir Singh

- i) A bone deep lacerated wound of 8 x 3 cms size, obliquely placed on the left frontol parietal region. Fresh clotted blood was present. It was 8 cms above the lateral end of left eye brow. X-ray skull was advised and injury was referred to surgeon's opinion;
- ii) A diffused reddish swelling on the right parietal region, 8 cms above the middle of the right eye brow. X-ray skull was advised. Injury was referred to surgeon's opinion; and,
- iii) A red contusion of 8 x 3 cms size, on the left infra scapular region, obliquely placed. X-ray was advised.

All the injuries were kept under observation. Copy of MLR is Ex.PE and diagram showing location of injuries is Ex.PE/1.

Balbir Singh:

- i) Lacerated wound of 4 x 3 cms size on the right temporal region. Fresh clotted blood was present and x-ray was advised;
- ii) A red contusion of 6 x 3 cms of size on the dorsal aspect of right forearm, 6 cms above the wrist. X-ray was advised.

Both the injuries were kept under observation. MLR is Ex.PF while diagram showing seats of injuries is Ex.PF/1.

Khimman

- i) A skin deep lacerated wound of 3 x 2 cms size on the dorsal aspect of left hand, on the metacarpal. Fresh clotted blood was present and x-ray was advised;
- ii) A red abrasion of 1/2 x 1/2 cm size on the left wrist. Fresh clotted blood was present;
- iii) A lacerated wound of 1 x 1/2 cm size on the left side of the chin. Fresh blood was present; and,
- iv) A diffused reddish swelling on the anterior aspect of the chest, 2 cms below the sternal notch. Tenderness was present. X-ray. X-ray was advised.

Injuries No.1 and 4 were kept under observation while the rest two were declared simple. Ex.PG is the MLR and Ex.PG/1 is the diagram showing seats of the injuries.

Mehar Singh:

- i) A bone deep lacerated wound of 8 x 3 cms size on the left frontal region, longitudinally present, 6 cms over the eye brow. X-ray was advised;
- ii) A bone deep lacerated wound of 3 x 1½ cms size on the distal phalanx of right little finger. X-ray was advised.
- iii) A red contusion of 8 x 4 cms size on the lateral aspect of the left thigh on its upper part. X-ray was advised. All the injuries were kept under observation. MLR is Ex.PH and diagram is Ex.PH/1.

Smt. Bhagwani:

- i) A diffused reddish swelling on the dorsal aspect of the right hand at the metacarpal of the index and middle and the base of index finger. Tenderness was present and x-ray was advised;
- ii) A diffused reddish swelling on the left side of the face on the maxillary prominence. X-ray was advised.

Both the injuries were kept under observation. MLR is Ex.PJ and diagram showing seats of injuries is Ex.PJ/1.

This witness further testified that he had sent ruqqa (Ex.PK) to the police station Sadar, Gurgaon. He also identified signatures of Dr. S.P. Singh and Dr. P.Vats on application Ex.P.L and Ex.PM whereby injured Mahabir and Balbir Singh were declared unfit to make statements.

Dr. B.B. Aggarwal, Radiologist, General Hospital, Gurgaon, was examined as PW3. He had conducted radiological examination of Mahabir Singh and Mehar Singh on 19.5.1990 and 24.5.1990 respectively. In both these cases he had found fractures as under:-

Mahabir Singh

- i) Liner fracture parietal area of skull. X-ray report is Ex.PC and skiagram is Ex.P2.

Mehar Singh:

- i) Fracture tip of terminal phalynx of little finger of right hand.
X-ray report is Ex.PB while x-ray film is Ex.P1.

Autopsy on the dead body of Mahabir Singh was conducted by Dr. G.K. Chobey (PW6), Specialist Forensic Medicines and head of the Department, Safdarjang Hospital, New Delhi, at 2.30 p.m. on 23.5.1990. He found a stitched wound of 5 cms in length present over left temporal parietal region, which was obliquely placed. It was ante-mortem in nature. There was haematoma over left temporal parietal region of 7 x 4 x 1 cms size. On examination of skull, the doctor found that there was fracture of

left temporal bone extending through coronal suture to right temporal bone. He then noticed that there was right subdural haematoma over parietal lobe of size 7 x 6 x 1 cms. Parietal lobe was correspondingly depressed. There was contusion of right temporal lobe of size of 3 x 2 x 1 cms. Brain was edematous. Brain stem haemorrhage was present. According to his opinion, the death was due to coma, as a result of head injury, which was sufficient to cause death in ordinary course of nature and could be produced by application of blunt force.

Injuries on the person of some of the accused are as under:

On the day of occurrence itself, Dr. GS Shekhawat (PW-5) had also medico legally examined Raghunath appellant at 8-30PM and found the following injuries on his person:

1. A lacerated wound 4 cms x 3 cms x bone deep on the dorsal aspect of base of nail of the right thumb on the distal phalynx.

Tenderness wqas present and x-ray was advised.

2. A red contusion 6 cms x 5 cms on the right side of the next, 2 cms below the ankle of the mandible. Tenderness was present and injury was referred to surgeon's opinion.

3. The injured was complaining of pain all over the back, but no mark of external injury was seen.

Smt. Lado Devi wife of Raghunath Singh was also examined by the aforesaid doctor and on her person the following injuries were noticed:

1. A lacerated wound 3 cms x 2 cms x bone deep on the left frontal region, 8 cms above the middle of the eye brow. Fresh

clotted blood was present and x-ray was advised.

2. A diffused tender reddish swelling on the dorsal surface of right fore-arm in the middle. X-ray was advised.

According to Dr. B.B.Aggarwal, Radiologist, General Hospital, Gurgaon (PW-3), there was a fracture of distal phalynx of thumb with regard to one of the injuries on the person of Raghunath appellant.

It is worth mentioning here that when the aforesaid doctor examined Mahabir Singh at 7-20PM, he found smell of alcohol coming out of his mouth. 10 cc of blood was syringed out and sealed in a vial in order to ascertain the quantity of alcohol in the blood.

The injured eye-version account is in the shape of deposition of Balbir Singh (PW7), who is real brother of Mahabir (deceased) and son of Mehar Singh (PW8). Both of them have reiterated the prosecution version. Specific injuries attributed to the appellants have also been depicted in their substantive statements.

It needs to be mentioned that the other two injured witnesses, namely, Khimman real brother of Mehar Singh and Smt. Bhagwani have been given up as unnecessary. Mohan Lal and Mohinder were given up as having been won over by the accused.

Investigation conducted by HC Bhim Singh (PW-10) reveals that after the receipt of ruqa along with copy of the medico legal reports from the concerned doctor he went to General Hospital, Gurgaon and after

obtaining certificate from the doctor with regard to fitness of the injured, recorded the statement of Mehar Singh (Exhibit DF) and prepared the rough site-plan (Exhibit PR) of the place of occurrence. On 20-5-1990 he arrested Raghunath appellant, who suffered a disclosure statement and pursuant thereto got recovered a lathi, which was taken into possession vide recovery memo. P5. On the death of Mahabir on 23.5.1990 he added Section 304 IPC in this case.

ASI Rajinder Singh (PW-9), who was posted in police station Vinay Nagar, New Delhi, at the relevant time went to Safdarjang Hospital for recording the statement of Mahabir Singh and moved application Exhibit PP. However, the patient was found to be unfit. On his death, he prepared the inquest report (Ex. PQ) and recorded the statements of some witnesses regarding identification of the dead body.

SI Gurcharan Singh (PW-11) is the main Investigating Officer of the case to whom the investigation was entrusted on 28.5.1990. He recorded the supplementary statements of Balbir Singh, Khem Singh and Mehar Singh and arrested Kuldeep Singh, Braham Parkash (appellants) and Naresh (since dead). During interrogation Kuldeep suffered a disclosure statement (Exhibit PT). Pursuant to that he got recovered a pipe. Similarly on the basis of his disclosure statement (Ex. PU) , Braham Parkash appellant got recovered a lathi. Both the weapons were taken into possession vide separate recovery memos. Rough site-plans of the places of

recoveries of weapons were prepared. The other accused were also arrested by him on different dates i.e. 7.6.1990, 19.6.1990 and 21.6.1990.

Mool Chand Punia, Draftsman (PW4), had prepared the scaled site-plan (Ex.PD) after visiting the spot. According to the said plan, the place of occurrence is shown at point 'A' which is the kacha chabutra (raised platform). This is in front of the house of Raghunath. On the western side a rasta (path) is shown and on one side there is house of Mehar Singh. On the northern side Chhappar of Khem Chand is depicted. On eastern side chowk, house of Mehar Singh is shown. So is the position of rough site-plan (Ex.PR) prepared by HC Bhim Singh (PW-10), who had inspected the spot on 19-5-1990.

We do not feel the necessity of reproducing the evidence of other formal witnesses.

The stand taken by the appellants as emerging from the statement of Raghunath appellant is that on the day of occurrence, Mahabir had consumed excessive liquor and in the state of intoxication, he picked up a quarrel with a tailor at Gurgaon where he was given beatings. He was brought to the village by his brother Balbir Singh, but after some time he went out of his house and after coming near his (Raghunath's) house, he started abusing the inmates of the house. He picked up a jailly and came in front of their house and started mouthing filthy abuses. He was stopped by Raghunath. Similar request was made by his wife Smt. Lado. Mahabir

gave injury to Raghunath and Smt. Lado. Naresh (deceased) armed with a lathi also came there. Meanwhile Khema and Bhagwani also reached there to help Mahabir. The appellant side also caused injuries to them.

The plea taken up by Umed and Kuldeep is that they were not present at the spot and were falsely implicated.

We would also like to refer to the finding of the trial court wherein it is observed that the accused party came to the spot in three batches. In the first batch Kale alias Kuldeep and Parkash alias Braham Parkash came. In the second batch, Braham Parkash and Umed Singh arrived at the spot. In the third/last batch Raghunath and Smt. Mukat Lado had emerged. Since the accused side had not come collectively, but in three batches, that too with discernible time gap, it cannot be said that they formed an unlawful assembly with the object to commit the offence. The learned trial Court came to the conclusion that Section 148 IPC is not made out and similarly Section 149 IPC is not attracted. It was then observed that Naresh, Umed Singh, Raghunath and Smt. Mukat Lado entered into the arena only after the deceased was assaulted by the first batch of the accused i.e. Kale alias Kuldeep and Parkash alias Braham Parkash, therefore, they cannot be said to have become members of the unlawful assembly (para 49 refers).

On the basis of the aforesaid finding, the appellants have been convicted and sentenced as indicated hereinabove.

We have heard Mr. RS Cheema, learned Senior counsel assisted by Mr. JS Mehendiratta appearing for all the appellants and Mr. Sunil Katyal, learned Deputy Advocate General, Haryana. With their assistance we have gone through the entire record minutely.

Mr. Cheema submits that the case of the prosecution collapses on the point of genesis of the occurrence itself as the complainant side has not come out with a true picture and concealed certain material facts. He submits that before recording the statement Ex. DF of Mehar Singh at 11.55 PM, statement of Raghunath Ex. DX (DDR No. 23) was already recorded by the police at 7.15 PM in which Raghunath appellant had given the true sequence of the occurrence. Mehar Singh has subsequently given a twist to the entire case. Dwelling upon his arguments, the learned counsel submits that a very important fact which goes to the root of the case is that Mehar Singh does not talk a word about the presence of Raghunath and his wife Lado at the spot whereas these two persons did receive injuries in the said occurrence as is clear from the statement of Dr. GS Sheikawat PW5 who had medico legally examined both of them at 8.30 PM on the date of occurrence itself and found as many as five injuries. One of the injuries on the person of Raghunath has turned out to be grievous in nature being fracture of thumb as is clear from the statement of Dr. B.B. Aggarwal, Radiologist, General Hospital, Gurgaon (PW3). From the aforesaid weakness Mr. Cheema wants to develop that the complainant side is

intentionally suppressing the genesis of the occurrence and that by itself is sufficient to disbelieve the prosecution case.

Another material fact on which learned counsel is relying very heavily is that the occurrence had taken place in front of the house of Raghunath as is clear from scaled site plan Ex. PD prepared by Mool Chand Punia, Draftsman PW4 wherein point 'A' (place of occurrence) is shown in front of house of Raghunath. House of Mehar Singh is also shown on one side. According to the learned counsel this very fact strengthens the initial report Ex. DX lodged by Raghunath wherein it is stated that Mahabir Singh in a drunken condition had come to his house, started abusing them in filthy language and ultimately caused injuries to him and his wife Lado. It is next argued that Mahabir Singh smelt alcohol when examined by Dr. Sheikawat. From this the learned counsel develops that Mahabir Singh was in the habit of consuming liquor daily and on the date of occurrence also he was under the influence of liquor at 5.00 PM which is otherwise odd time and is the root cause of this occurrence who provoked the appellants side to react to the situation. Strengthening his arguments the learned counsel submits that in order to over-come the aforesaid weakness, Balbir Singh the real brother of the deceased, when stepped into witness box, has stated that after Mahabir Singh had fallen on the ground crying with pains, he arranged liquor for him and made him to drink. Thereafter he became unconscious. This is a very clever twist, the learned counsel so contends.

Adverting to the eye version account, Mr. Cheema submits that the case of the prosecution hinges upon two injured witnesses viz Mehar Singh PW8 (father of the deceased), the first informant and Balbir Singh PW7 the real brother of the deceased. Other two injured witnesses namely Kheman brother of Mehar Singh and his wife Bhawani have been given up as unnecessary. The other non-injured witnesses namely Mohan Lal and Mohinder have also been given up as having been won over. Mr. Cheema contends that no doubt the prosecution is not supposed to increase the quantity of witnesses may be the injured one but it is the quality of the evidence that matters and in the instant case both the aforesaid injured witnesses are not un-folding the true picture before the court and have, thus, rendered themselves un-reliable. They have made an attempt to improve upon the case in every material aspect. While drawing the attention of this Court to the relevant portion of the substantive evidence of the aforesaid two witnesses, the learned counsel submits, that in order to explain the injuries on the person of the accused, both the witnesses state in their examination-in-chief that in their self defence they had caused injuries to Raghunath and Lado. Balbir Singh rather categorically states that the complainant had not caused any injury to any body else except Raghunath and Lado. Mehar Singh states that they were empty handed and had pelted stones towards accused side and because of that Lado and Raghunath had suffered injuries. Both these witnesses were confronted with this material

aspect from their earlier statement. The learned counsel then submits that if one reads the substantive statement of Balbir Singh PW7 it is revealed that Raghunath accused had given a lathi blow on the shoulder of his brother Mahabir Singh (since deceased) whereas in Ex. DF presence of Raghunath and his wife Lado is not shown. Balbir Singh then states that Smt. Lado and Raghunath accused had thrown brick bats at Bhagwani and Mehar Singh PW8. He was also confronted with his previous statement where this fact is not recorded. A specific question was put to this witness in cross-examination with regard to the participation of Raghunath and Lado to which the reply given is that the police had not recorded the full statement of his father Mehar Singh. From these infirmities, the learned counsel wants to develop that in fact Raghunath and Lado had not at all caused any injury to any body and had rather received certain injuries at the hands of Mahabir Singh (since deceased) and others as is the case set up by Raghunath in his statement Ex. DX recorded immediately after the occurrence. All these facts go to show that Raghunath and Lado appellants have not caused any injury to any one from the side of the complainant and they deserve acquittal and even the State appeal qua them also deserves to be dismissed.

With regard to other three appellants, namely, Kale alias Kuldeep, Parkash alias Brahm Parkash and Umed Singh, Mr. Cheema submits that the learned trial court in para no. 49 of the impugned judgment

has observed that the accused came at the spot in three batches and therefore, section 148 IPC or section 149 IPC cannot said to be attracted. He then states that so far as Umed Singh appellant is concerned, the observation of the trial court is that he had entered the arena along with Naresh, Raghunath and Lado after Mahabir Singh was assaulted by the first batch (batch of Kale and Brahm Parkash appellants) and therefore, Umed Singh has been convicted only under section 323 IPC read with section 34 IPC. According to Mr. Cheema the State cannot improve its case qua Umed Singh beyond that and he too deserves acquittal on the basis of the aforesaid discussion.

Adverting to the role attributed to Kale and Parkash appellants, Mr. Cheema submits that the observation of the learned trial court in para no. 50 of the impugned judgment is that deceased Mahabir Singh was inflicted two injuries by iron pipe by Kale appellant. The first injury in MLR Ex. PE synchronises with the injury shown in the post mortem report Ex. PN. The observation of the learned trial court is that the second injury mentioned at Sr. No. 2 in the MLR which is in the nature of swelling could not have been in existence by the time post mortem examination was conducted on 23.5.1990. According to learned counsel, the observation made by the learned trial court in this regard is not sustainable for the reason that the very case set up by the complainant side is that Kale gave a pipe blow lathiwise on the head of Mahabir Singh and

then Prakash gave a lathi blow to Mehar Singh his father on his head. It is nowhere mentioned in Ex. DF that Kale had given two pipe blows on the head of Mahabir Singh. No doubt when Balbir Singh brother of the deceased stepped into witness box, he stated that Kale had given two iron pipe blows on the head of his brother Mahabir Singh but in cross-examination he categorically stated that they had not told the police that Kale had given two blows with iron pipe. Mehar Singh when stepped into witness box had also stated that Kale had given two iron pipe blows on the head of his son Mahabir Singh but in his cross-examination he states that the police had not recorded his statement correctly. From this Mr. Cheema develops that may be in the MLR, doctor had noticed that there was diffused reddish swelling on the right parietal region above the middle of the right eye brow, the same could be on account of seepage of some blood internally as an after effect of injury no. 1 which was on the frontal parietal region and that is the reason that after the death of Mahabir Singh, Dr. Chobey who had conducted the autopsy had noticed only one injury on the person of the deceased and after opening the scalp he noticed fracture extending towards the right temporal side. According to the learned counsel in fact there is only one injury on the head allegedly attributed to Kale.

Mr. Cheema lastly contends that taking the totality of evidence into consideration, even common intention of Kale and Parkash appellants is also not made out and as such their conviction recorded under section

302 IPC read with section 34 IPC is not sustainable. Dissecting the prosecution case further he contends that qua Kale appellant also, his case would not fall within the mischief of section 302 IPC may be the sole injury attributed to him has proved to be fatal in nature and it would at the most attract section 304 Part-I or Part II IPC. However, his primary attempt is that the case of the prosecution is not proved to the hilt because of the aforesaid weaknesses in it and all the appellants deserve acquittal.

Controverting the submissions advanced by Mr. Cheema, Mr. Sunil Katyal, learned Deputy Advocate General, submits that all the accused had appeared at the scene of occurrence within a few minutes may be in different batches and have caused injuries to the complainant side and therefore, they all are liable to be convicted for the charges framed against them. According to Mr. Katyal not only the conviction of Kale and Parkash deserves to be upheld for the offence punishable under section 302/34 IPC for the death of Mahabir Singh but also even Umed Singh, Raghunath and Lado who have been convicted under section 323/34 IPC are liable to be convicted for the main offences viz section 302 IPC read with section 149 IPC for which they were charged. Mr. Katyal then submits that when all the facts are taken collectively, section 149 IPC is attracted and therefore, the State appeal filed against the acquittal of Raghunath, his wife Lado and Umed for the main charge deserves to be allowed.

After examining the entire evidence and otherwise also as

observed by the learned trial court, at least one fact is very clear that the accused had reached in three batches at the spot. Therefore, un-lawful assembly is not established. It is settled legal position that once an unlawful assembly is established then all the accused are of course liable to be convicted on the principle of vicarious liability even if no overt act is attributed. In the present case the factual position is otherwise and therefore, the prosecution case is to be segregated in parts.

First of all we are taking up the case of Raghunath and Lado appellant. Admitted position is that they are not named in the initial statement Ex. DF which is the basis of the recording of the FIR. They figured in the substantive statement of Mehar Singh and Balbir Singh and in their statements some part has been attributed to them. Both these witnesses were, however, confronted with these material aspect in their cross-examination. It is an admitted fact that Raghunath and Lado have received injuries. One of the injuries on the person of Raghunath had turned out to be grievous in nature. In Ex. DF it is stated by Mehar Singh that they had also caused injuries to the accused side but without naming any one. When the injured eye witnesses stepped into witness box, an explanation was given with regard to the injuries on the person of Raghunath and Lado. In our considered view, this was certainly an improvement for the reason that by that time they had come to know that Raghunath and Lado had received injuries at their hands. Balbir Singh had gone to the extent of even

saying that Raghunath had given a lathi blow on the shoulder of his brother Mahabir Singh. This again, in our view, is a very material improvement as the complainant side wanted to show attribution to Raghunath qua injury no. 3 on the person of Mahabir Singh. We would have certainly given some latitude to the prosecution in this regard, had the presence of Raghunath and Lado been shown in the initial statement. May be Raghunath and Lado were very much present at the time of occurrence as is clear from their injuries, but they had not caused injury to any of the complainants. Another fact which comes to the rescue of these two appellants is that the occurrence had taken place in front of the house of Raghunath as is clear from the scaled site plan. Their plea also gets support from statement Ex. DX of Raghunath recorded at 7.15 PM i.e. just after two hours of the occurrence and in the present set of facts and circumstances, we are doubtful about their participation in the occurrence as alleged by the prosecution. Therefore, while extending benefit of doubt, we hereby acquit both of them.

Let us now deal with the case of other appellants. The admitted position is that Umed Singh appellant who stands convicted under section 323 IPC read with section 34 IPC appears at the scene of occurrence in the second batch and therefore, his case is distinguishable from that of Kale and Parkash. Another admitted position is that Parkash who is shown to be present in the first batch initially with his brother Kale who was allegedly

armed with an iron pipe has not caused any injury to the deceased. As we have already observed that in the present case the conviction cannot be maintained with the aid of section 149 IPC, what is now to be held is as to whether in the present set of circumstances when the occurrence had taken place where houses of both the sides are adjacent to each other, as is clear from the scaled site plan and the fact that incident appears to have flared up on the provocation of Mahabir Singh (since deceased) who under the influence of liquor was present in front of the house of Raghunath where both the sides had gathered subsequently in batches, conviction of Kale and Parkash can be maintained under section 302 read with section 34 IPC as already observed by the learned trial court.

Taking into account the entire evidence in the required perspective, we come to an irresistible conclusion that the conviction of Parkash appellant under section 302 read with section 34 IPC is not sustainable and he is liable to be convicted under section 325 IPC read with section 34 IPC and section 323 IPC read with section 34 IPC only for which he is also charged with and convicted by the trial court. At the same time conviction of Umed Singh appellant for the offence punishable under section 323/34 IPC is also justified. Ordered accordingly.

We are now left to deal with the case of Kale appellant. After rescanning the entire medical evidence which is discussed herein above, we agree with the argument of Mr. Cheema that there is only one injury on the

head of Mahabir Singh which ultimately proved to be fatal and is allegedly attributed to Kale appellant. No doubt Balbir Singh (PW7) and Mehar Singh (PW8) when stepped into witness box made improvement in their respective statements in order to attribute two injuries to Kale but we are of the view that this all was done by taking advantage of injury no. 2 as shown in the MLR. The fact remains that as per the most mortem there is only one injury on the head which has ultimately resulted into fracture extending towards right side. At the cost of repetition we may state here that injury no. 2 as depicted in MLR is diffused reddish swelling on the right parietal region and it had vanished at the time of autopsy. This, in our view, was on account of internal bleeding and that is the reason that the swelling gradually vanished away during the treatment of injured Mahabir Singh. From this we can safely conclude that there was one injury only on the head of the deceased allegedly caused by Kale appellant with an iron pipe.

We have already observed the manner of occurrence in the preceding paras and we have now to see as to whether conviction of Kale appellant under section 302 IPC is sustainable despite the fact that the injury attributed to him has proved to be fatal. In a latest judgment of Hon'ble the Apex Court rendered in **Raj Pal and others vs State of Haryana** 2006(3) RCC 209, their Lordships have observed that in the scheme of IPC 'culpable homicide' is the genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice versa. IPC recognizes three degrees of

culpable homicide. The first degree and the gravest form of culpable homicide is defined in section 300 as 'murder'. The second degree of culpable homicide is punishable under first part of section 304. Culpable homicide of third degree is punishable under the second part of section 304 IPC. It has been further observed by their Lordships in the aforesaid judgment that the academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the courts. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of sections 299 and 300. Their Lordships while dealing with said aspect have depicted the following comparative table which will be helpful in appreciating the points of distinction between the two offences:

Section 299	Section 300
<i>A person commits culpable homicide if the act by the death is caused is done</i>	<i>Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done-</i>

INTENTION

<i>(a) With the intention of causing death; or (b) with the intention of causing such bodily injury as it likely to cause death; or (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or</i>	<i>(1) with the intention of causing death; or</i>
	<i>(3) With the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or</i>

KNOWLEDGE

<i>(c) with the knowledge that the act is likely to cause death</i>	<i>(4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death</i>
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It is also observed that the above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each, that it may not be convenient to give a separate and clear cut treatment to the matters involved in the second and third stages.

We, while following the ratio of the aforesaid judgment of Apex Court and after taking into account the totality of evidence and other features especially the manner in which the present occurrence had taken place, have come to the conclusion that the case of Kale appellant falls within the ambit of section 304 Part-I IPC. Therefore, his conviction as

recorded by the trial court under section 302 IPC deserves to be set aside.

Ordered accordingly.

In the sequel to the aforesaid discussion, the net result which surfaces is that Criminal Appeal No. 521-DB of 1998 is partly allowed. Appellant Raghunath and his wife Smt. Mukat Lado (appellant Nos. 4 and 5) are hereby acquitted of all the charges. The conviction and sentence of Kale alias Kuldeep under section 302 IPC read with section 34 IPC is hereby set aside and he instead is convicted under section 304 Part-I IPC substantively and sentenced to undergo rigorous imprisonment for eight years and to pay a fine of Rs 1000/-, in default thereof to further undergo RI for six months. His conviction for other two offences viz sections 325 and 323 IPC as already recorded shall remain unaltered. The conviction of Parkash alias Braham Parkash under section 302 IPC read with section 34 IPC is also set aside. He is acquitted of the said charge, whereas his conviction and sentence under section 325 IPC read with section 34 IPC and under section 323 IPC read with section 34 IPC as already recorded by the trial court shall remain unaltered. All the aforesaid sentences shall, however, run concurrently. We also uphold the conviction and sentence of Umed Singh appellant under section 323 IPC read with section 34 IPC.

Resultantly Criminal Appeal No. 549-DBA of 2005 filed by State of Haryana against Umed Singh, Raghunath and Smt. Mukat Lado stands dismissed.

Both the appeals are consequently disposed of.

Office is directed to inform the concerned quarters of the outcome of the present two appeals without any delay.

**(Virender Singh)
Judge**

**August 07, 2006
'ask/dalbir'**

**(A.N. Jindal)
Judge**

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

Date of decision : August 7, 2006

Criminal Appeal No. 549-DBA of 2005

State of Haryana vs Umed Singh and others

**Coram: Hon'ble Mr. Justice Virender Singh
Hon'ble Mr. Justice A.N.Jindal**

**Present: Mr. Sunil Katyal, DAG, Haryana.
Mr. RS Cheema, Senior Advocate, with
Mr. JS Mehendiratta, Advocate, for the respondents**

Virender Singh J.,

For judgment, see Criminal Appeal No. 521-DB of 1998, Kale
alias Kuldeep & others vs State of Haryana.

**(Virender Singh)
Judge**

**(A.N. Jindal)
Judge**

**August 07, 2006
'ask/dalbir'**

**Criminal Appeal No. 521-DB of 1998 &
Criminal Appeal No. 549-DBA of 2005**

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